

(10)
No. 89-1793

Supreme Court, U.S.

FILED

OCT 31 1990

JOSEPH F. BOWEN, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As reflected in our opening brief, this case presents two issues for the Court's decision. The first is whether the court of appeals erred in articulating and applying a mechanical test for determining the scope of the discretionary function exception—a test that turns on whether those actions can be characterized as “operational” in nature. As we have shown, the court of appeals' application of such an erroneous test requires, at a minimum, that its judgment be reversed so that a proper test can be applied—one that focuses on whether the conduct in question involved the exercise of policy judgment. See U.S. Br. 18-35.

The second issue presented—the evaluation of the particular actions at issue under a proper test—could be left

to further proceedings on remand. But we have shown that the present record permits this Court to address that issue now, and to uphold the district court's conclusion that the challenged actions fall within the discretionary function exception. U.S. Br. 36-47.

In his brief to this Court, respondent blurs the distinction between these two issues and focuses almost entirely on the second. Indeed, respondent eschews any real defense of the court of appeals' rationale, instead attempting to reformulate that court's reasoning and suggesting his own mechanical tests. These tests are ultimately no more appropriate than the one articulated by the court below, for they, too, represent efforts to short-circuit the required analysis of the nature of the discretion exercised in particular contexts.

Nor does respondent succeed in his attempts to refute the discretionary nature of the specific regulatory actions on which his claim is based. Notwithstanding respondent's rhetoric about the supposedly egregious errors committed by federal regulators, he fails to undermine the district court's determination that the challenged actions were policy-based, discretionary decisions by federal regulators—actions that fall within the discretionary function exception “whether or not the discretion involved [is] abused.” 28 U.S.C. 2680(a).¹

A. 1. Perhaps the most serious flaw in the court of appeals' ruling is its reliance—in determining that certain activities of federal thrift regulators fall outside the discretionary function exception—on the supposedly

¹ Respondent also makes the essentially frivolous argument that the discretionary function issue is “not * * * squarely presented” and that any ruling on this point by this Court will be an “advisory opinion.” Resp. Br. 47. On the contrary, the discretionary function issue is squarely presented by virtue of the positions taken by the parties below and the ruling of the court of appeals. As noted in our reply brief at the petition stage, a ruling on that issue by this Court will have very real, nonadvisory consequences: if the Court agrees with our position, the case is at an end; if the Court adopts respondent's arguments, the litigation must continue.

“operational” nature of those activities. The centrality of this mechanical test in the court of appeals' analysis is plain on the face of that court's opinion. The court expressly stated that the distinction between discretionary policy decisions and “operational actions”—a distinction purportedly derived from this Court's opinion in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)—“still retains its force today and is dispositive of this case.” Pet. App. 7a. Applying what it called “the *Indian Towing* test,” the court of appeals dealt with the specific regulatory actions at issue in the most conclusory manner, stating simply that federal regulators “lost the protection of § 2680(a)” when they purportedly “assume[d] operational control” by advising IASA's officers and directors about specific issues regarding the institution's management. *Id.* at 13a, 14a.

Respondent makes at most a half-hearted effort to defend the court of appeals' approach, contending that a focus on the “operational” nature of government activities is inappropriate “only if it reflects that the court's analysis turned solely upon the *level* in the employment hierarchy occupied by the actor involved.” Resp. Br. 12 n.6. Respondent then argues that there can be no such problem in the present case, because all of the conduct at issue (the conduct held within and beyond the exception) was carried out at the same level. *Ibid.* This simplistic reasoning ignores the fact that improper emphasis on the level at which an action is taken is only one of the errors inherent in the court of appeals' “operational” test. See U.S. Br. 32. The more basic flaw in that test (or any other equally mechanical test) is that it pretermits the required analysis—i.e., a determination whether an action, in context, entailed discretionary decision-making grounded in considerations of “social, economic, and political policy.” *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

Tacitly acknowledging this essential point, respondent attempts to recharacterize the court of appeals' reliance

on the supposed "operational" nature of the actions at issue here as mere "shorthand" for the requisite analysis of the challenged conduct. Resp. Br. 12 n.6. But respondent can point to nothing in the court of appeals' decision to support this notion. Consider, for example, respondent's allegation that federal officials "urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered savings and loan," Amended Compl. para. 34.b, J.A. 14—one of the allegations that the court of appeals held was outside the discretionary function exception, Pet. App. 14a. If the court of appeals had actually applied the test articulated in *Varig Airlines*, that court would have confronted the question whether the discretion exercised in taking such an action was grounded in public policy concerns.² Yet the court of appeals' opinion is devoid of any such analysis; the court merely branded this and other actions as "operational" and considered the matter closed. *Ibid.*

2. The equally mechanical alternatives proposed by respondent are no more faithful to the text and policies of the FTCA than the "operational" test endorsed by the Fifth Circuit. For example, respondent repeatedly argues that the discretionary function exception does not encompass "individual acts of negligence." Resp. Br. 23, 25, 28, 39-40. That limitation, however, finds no support in the text of the FTCA. Moreover, respondent has lifted that phrase out of context from the preliminary factual

² The answer to such an inquiry, in our view, is obvious. If a federal official advises (or even pressures) a regulated institution to alter its status in such a way as to take it out of the jurisdiction of state regulators and make it subject to more extensive federal regulation, such an action is necessarily based on that official's discretionary judgment about the application of regulatory policies. Whether such advice is ultimately right or wrong—"whether or not [the official's] discretion involved be abused," 28 U.S.C. 2680(a)—taking such action is inherently within the scope of the sort of public policy matters Congress has shielded from "second-guessing" * * * through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814.

discussion in *Dalehite v. United States*, 346 U.S. 15 (1953). As used by respondent, the phrase is virtually meaningless, and in no way reflects any principle endorsed by this Court in that case. Although *Dalehite* made a passing reference to the absence of allegations of "individual acts" of negligence, *id.* at 23, nowhere did the Court suggest that this phrase should be used to determine how particular challenged actions should be treated. On the contrary, the Court's analysis in *Dalehite* emphasized the breadth of governmental decisions to which the discretionary function exception applies, extending both to very specific decisions about a manufacturing process and to actions regarding the supervision of the loading of ships. See *id.* at 38-43; U.S. Br. 22-23.

Respondent attempts to find support for its "individual acts of negligence" approach in this Court's opinion in *Varig Airlines*, Resp. Br. 28, 39-40, but that attempt is similarly wide of the mark. In *Varig Airlines*, the Court made it clear that individual negligent actions *can* fall within the exception if they entail the requisite exercise of policy discretion. *Varig Airlines* applied the discretionary function exception not only to a broad agency decision to institute a "spot-check" inspection program, but also to specific allegations of negligence in failing to check certain specific items in the course of certifying a particular aircraft. 467 U.S. at 820.³ This holding squarely refutes any notion that application of the discretionary function exception can or should turn on such an artificial criterion as whether the challenged conduct involved only an "individual act of negligence." The key inquiry is whether

³ Respondent attempts to trivialize this pivotal ruling in *Varig Airlines* by suggesting that the Court would have reached an opposite result if the alleged specific acts of negligence had involved negligence in an "actual inspection" rather than failure to inspect. Resp. Br. 28 & n.16. This Court never suggested such an artificial distinction between misfeasance and nonfeasance, and the entire logic of the Court's analysis refutes respondent's position that acts of alleged misfeasance necessarily fall outside the scope of the exception.

the action in question—regardless of whether it is a broad decision made by a Cabinet-level officer at the planning stage, or a “specific act” of alleged negligence by a subordinate—was itself one calling for the exercise of policy judgment.

In attempting to apply his “specific act of negligence” test, respondent not only fails to shed any light on the question at hand, but also misstates our position. See Resp. Br. 39-40. Contrary to respondent’s contentions, we have never argued that *any* action falls within the discretionary function exception “merely by virtue of the fact that it was taken in implementation of a protected policy decision.” *Id.* at 39. If that were our position, we would have omitted the second part of the argument in our opening brief (at 36-47), because all of the actions at issue here were plainly “in implementation of” policy decisions regarding thrift regulation. The position we have taken in this case—consistent with this Court’s discretionary function rulings—is simply that each challenged action must be evaluated to determine whether it entailed the exercise of policy judgment.

3. Respondent’s other mechanical test is his claim that discretionary decisions by federal officials involving “professional and technical judgment” are necessarily beyond the scope of the exception. Resp. Br. 21-22, 33-34, 36. Such a sweeping rule, however, would exclude from the exception a vast array of unquestionably policy-oriented decisions, and therefore would vitiate important policies served by the exception itself. Indeed, it is likely that most significant governmental decisions are made by employees who, by virtue of the training necessary to their jobs, can be said to exercise professional or technical judgment.

Respondent’s theory also cannot be reconciled with *Dalehite* and *Varig Airlines*. *Dalehite*, for example, held that highly technical decisions regarding the fertilizer manufacturing process—*e.g.*, the determination of the temperature at which the fertilizer would be packed and the type

of coating that would be used—fell within the exception since they were intertwined with policy decisions affecting the feasibility of the program. See 346 U.S. at 40-41. In *Varig Airlines*, the decisions of individual aircraft inspectors as to the appropriate scrutiny of particular aircraft elements necessarily involved the application of the same sort of professional and technical expertise as that exercised by the designers and manufacturers of the aircraft. This Court recognized that the decisions made by the persons applying those skills “fall squarely within the discretionary function exception,” 467 U.S. at 820, because they occurred in the context of a regulatory program that called upon the inspectors to exercise discretion related to the underlying regulatory policies. Other discretionary function exception cases have similarly found policy discretion in such professionally or technically oriented matters as the design of a canal⁴ or the design and maintenance of a missile control room.⁵

As we have shown, the context in which an activity is carried out can imbue an action with a strong public policy orientation, even if that action superficially resembles activities conducted by ordinary businesses. For example, although the evaluation of a loan applicant is an everyday commercial decision for financial institutions, the analogous decision by a federal lending agency normally entails discretion related to the policies of the federal loan program, and thus falls within the discretionary function exception. See *Williamson v. United States Dep’t of Agriculture*, 815 F.2d 368, 374-376 (5th Cir. 1987).⁶

⁴ *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1027-1028 (9th Cir. 1989).

⁵ *Ayer v. United States*, 902 F.2d 1038 (1st Cir. 1990).

⁶ Respondent errs in characterizing our position as arguing that *any* decision involving economic or cost considerations necessarily falls within the discretionary function exception. See Resp. Br. 23 n.12, 25 n.14.

And even the most obvious types of protected discretionary decisions made by federal banking regulators—such as a decision that a particular institution is insolvent, and hence subject to receivership or similar regulatory measures⁷—necessarily involve the same sort of “professional” and “technical” judgments that respondent emphasizes in this case.

Relying on a passage from *Berkovitz v. United States*, 486 U.S. 531, 544-545 (1988), respondent implies that decisions turning solely on “objective scientific standards” necessarily fall outside the scope of the discretionary function exception. Resp. Br. 30. A full reading of the passage in *Berkovitz* reveals, however, that such “objective” standards take an action outside the discretionary function exception only if they control the decision in question, to the exclusion of the exercise of policy judgment. With respect to the matter at issue there, this Court remanded for further proceedings, to determine whether federal officials “permissibly exercise policy choice” in making that particular type of decision. 486 U.S. at 545. Thus, this passage simply reinforces the established principle that the application of the discretionary function exception cannot turn on such mechanical tests as whether the action is “operational,” involves only a “single act of negligence,” or entails the exercise of “professional” judgment; it must instead turn on a careful evaluation of whether the particular type of action at issue, in the context in which it is taken, involves the exercise of policy judgment.

B. Even as catalogued by respondent, Resp. Br. 31, the actions challenged here were highly discretionary matters in which federal thrift regulators necessarily exercised a high degree of judgment. Federal officials are alleged to have influenced the choice of managers, directors, and consultants for IASA, as well as other important decisions

⁷ *Golden Pacific Bancorp. v. Clarke*, 837 F.2d 509 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988); see also U.S. Br. 41 n.29 (collecting cases).

regarding conversion to federally chartered status, the placement of subsidiary corporations into bankruptcy, and the institution of litigation. As an initial matter, there can be no question that such activities involve delicate, discretionary choices that bear little resemblance to the nondiscretionary activities at issue in many of the cases on which respondent relies—activities such as maintenance of a lighthouse in working order,⁸ deciding whether to provide road warning signs,⁹ or the placement of directional buoys.¹⁰ See Resp. Br. 34. The only question, then, is whether the discretionary decisions involved here called for the use of *policy* judgment by the federal thrift regulators. When the challenged activities are viewed in their regulatory context, it is apparent that they were indeed imbued with precisely the sort of policy discretion that Congress intended to shield when it enacted the discretionary function exception.

1. In his brief to this Court, as throughout this litigation, respondent strives to ignore the context in which the challenged regulatory actions took place. From respondent’s rhetoric, one might suppose that the “interference” in IASA’s affairs that took place was simply the result of aberrant actions of persons who happened to be employed by federal agencies. The record belies that view. As shown in our opening brief, the context in which the challenged actions occurred included, at a minimum, regulatory concerns about respondent’s fitness and IASA’s soundness. U.S. Br. 8-9, 39 n.26. Whether those concerns were well-founded—and whether the subsequent regulatory actions were proper—are not at issue here, for the discretionary function exception applies “whether or not the discretion involved be abused.” 28 U.S.C. 2680(a).

⁸ See *Indian Towing Co. v. United States*, *supra*.

⁹ See *Seyler v. United States*, 832 F.2d 120 (9th Cir. 1987).

¹⁰ See *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985).

Respondent would have this Court ignore entirely the background in which the challenged actions took place simply because that background cannot be ascertained within the four corners of his complaint. Contrary to respondent's supposition, the basic background information the United States introduced in the district court was a proper part of its presentation in support of a motion to dismiss for lack of subject matter jurisdiction. See U.S. Br. 6 n.6; *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). And contrary to respondent's present argument, the basic background facts on which we rely are *not* in conflict with anything in his complaint and have not been disputed. For example, in characterizing our brief as "contend[ing]" that IASA was in fact already failing prior to the actions at issue here, and in asserting that this contention is contrary to his allegations regarding IASA's financial condition, Resp. Br. 2, respondent has missed the point of our limited factual discussion. We do *not* seek at this juncture to involve this Court in the factual controversy regarding IASA's actual financial condition as of early 1986. On the other hand, the undisputed record shows that federal regulators received audit reports at that time indicating serious troubles at IASA. U.S. Br. 8-9. Whether or not those reports may ultimately be proved incorrect, their very existence in 1986—which is *not* disputed¹¹—lays to rest any doubt that the actions challenged in this case arose in the context of regulatory concerns regarding the health of a thrift institution.

2. Respondent also attempts to divorce this case from its regulatory context by his repeated assertions that the federal officials who took actions regarding IASA "aban-

¹¹ Although respondent has repeatedly (and erroneously) objected to the use of the background information submitted in the district court, *e.g.*, Resp. Br. 3-4 & n.2, he has never presented any factual refutation to any part of it. His belated and conclusory statement that he "dispute[s]" the materials submitted below, *id.* at 4 n.2, is an inadequate basis for requiring this Court to ignore basic background facts that were adduced and unrebutted below.

doned their role as regulator," Resp. Br. 2-3, 15, 27 n.15, and engaged in an "extraregulatory take-over" of the institution. *Id.* at 6, 31. Stripped of rhetorical flourishes, these assertions simply imply that the actions of the federal regulators here were beyond the proper scope of their discretion. In so arguing, respondent seems to be confusing the present damages action under the FTCA with an action for judicial review under the Administrative Procedure Act. In an action of the latter sort, it would of course matter if the regulatory actions at issue were arbitrary, capricious, or constituted an abuse of discretion. See 5 U.S.C. 706. To suppose that such arguments are relevant in the present case, however, exhibits a fundamental misunderstanding of the Federal Tort Claims Act and the discretionary function exception. In enacting that exception, Congress specifically intended that claims of abuse of discretion *not* be cognizable in tort actions against the United States. See U.S. Br. 20-21 (discussing FTCA legislative history).

At times, respondent's arguments in this regard seem to invoke the central principle of *Berkovitz v. United States*, *supra*, that the discretionary function exception is inapplicable where federal officials violate a "specifically prescribe[d] * * * course of action." 486 U.S. at 536; see, *e.g.*, Resp. Br. 14 ("officials acted outside federal regulatory policy"), 26 n.14 (actions "*outside* the permissible realm of choice"). As respondent elsewhere admits, however, existing regulatory policies did *not* dictate what specific actions federal regulators should take in their informal supervision of a thrift's activities. *Id.* at 14. As the court of appeals itself noted, the discretionary actions at issue here were not "closely guided by statute" or regulation, and the central holding of *Berkovitz* is not pertinent here. Pet. App. 11a-12a. Furthermore, as the court of appeals also noted, the authority of federal thrift regulators to engage in informal supervision of regulated institutions in circumstances like this, in lieu of more formal regulatory actions, is well established,

and indeed was "unchallenged." *Id.* at 12a; see U.S. Br. 26-27.

Respondent now challenges that authority in two respects. First, he invokes FHLBB's own written policy to deny that federal regulators may ever use informal means to influence the activities of a troubled thrift institution. See Resp. Br. 6-7 n.3, 27 n.15, 44 n.26. But respondent misreads the FHLBB's policy, which expressly gives regulatory officials a *choice* between informal supervisory actions and formal enforcement actions. FHLBB Res. No. 82-381 (May 26, 1982), *reprinted at* Resp. Br. App. 4a-5a. Although the written policy further provides that the choice between such formal and informal measures should be guided by the seriousness and immediacy of the peril facing the institution, Resp. Br. App. 5a, such choices obviously involve a high degree of regulatory discretion. Nowhere in the FHLBB policy is there anything approaching the mandatory language in the FDA regulations at issue in *Berkovitz*.

Second, respondent argues that IASA's allegedly sound financial condition "precluded" any regulatory intervention, whether formal or informal. Resp. Br. 2, 24 n.13, 39 n.23. Here again, respondent labors under the misimpression that he can prevail by showing that the challenged actions lacked a solid factual foundation or otherwise constituted an abuse of discretion. Whether or not it is ultimately determined to be well founded, a decision by federal financial regulators that regulatory intervention is called for in a particular situation is (as the court below acknowledged) the most obvious sort of discretionary decision. In the absence of any violation of a "specifically prescribe[d] * * * course of action," *Berkovitz*, 486 U.S. at 536, respondent's arguments that the regulatory actions taken here were improper or without sufficient foundation simply do not advance his case.

A related aspect of the actions at issue here is that, notwithstanding respondent's characterization, Resp. Br. 32 n.19, the alleged "take-over" of IASA was necessarily

limited to attempts to advise or influence IASA. Indeed, respondent's Amended Complaint is devoid of any factual allegation that federal officials had physically taken control of IASA's assets or had the authority to act on behalf of that corporation. What the Amended Complaint actually alleged is that federal officials "gave advice and made recommendations" concerning a variety of corporate activities. See Amended Compl. paras. 33, 34, J.A. 13-16; U.S. Br. 37-39. Moreover, this limitation is inherent in the nature of the informal supervision that occurred here. The only reason why suasion is effective, after all, is the possibility that federal regulators may undertake more drastic regulatory measures instead. Federal regulators in this posture simply have no legal means of directing an institution's activities, except to the extent that an institution's management decides it is in the firm's best interest to comply with the regulators' advice.¹² If the managers and directors of an institution believe that following the proffered advice will be harmful to the institution, they are free to ignore it, especially if—as respondent contends was the case here—they are confident that the institution is financially sound and therefore that there is no adequate basis for formal enforcement measures. Cf. Resp. Br. 2.¹³

3. One of respondent's principal arguments is that no "policy" discretion was at issue here, because federal

¹² The FHLBB's written policy recognizes that the advisability of even undertaking informal supervisory actions will turn in large part on federal officials' "assessment of management's willingness to take appropriate corrective actions." FHLBB Res. No. 82-381, *supra*, *reprinted at* Resp. Br. App. 5a.

¹³ Where there is a substantial basis for further enforcement measures, on the other hand, the pressure on thrift management to accede to informal supervision may be great indeed—a fact we have no "reluctance" to acknowledge. See Resp. Br. 32 n.19. In our view, however, this nexus between admittedly discretionary enforcement initiatives and the sort of informal supervision at issue here only makes more clear the discretionary, policy-based character of that supervision.

regulators had to apply "professional and technical" principles in taking the actions at issue. In making this argument, respondent presumes that the decisions made by those officials called only for the same sort of "thrift management judgment" that thrift managers themselves exercise, based on "professional experience and developed technical expertise." Resp. Br. 33. But respondent overlooks the fact that federal regulators are *not* thrift managers and necessarily approach even "operational" decisions regarding the affairs of a thrift from a distinct perspective, guided by federal regulatory policies. As FHLBB's own written policy reflected, federal regulators become involved in supervisory actions regarding the management of an individual institution only when they have determined that (a) violations warranting regulatory intervention have occurred, and (b) more formal enforcement measures are not required. FHLBB Res. No. 82-381, *supra*, reprinted at Resp. Br. App. 5a. The goals of formal intervention are essentially the same as the goals of informal suasion: "to prevent the continuation of violations or practices that may result in financial harm to the institution, its customers, or [federal insurance funds]." *Ibid.* Cf. *Woods v. FHLBB*, 826 F.2d 1400, 1411 (5th Cir. 1987) (goal of regulatory activities is "to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds"), cert. denied, 485 U.S. 959 (1988).

Accordingly, the actions of federal regulators engaging in informal supervision of financial institutions are inextricably bound up with regulatory policies. Individual decisions regarding the kind of guidance to give are necessarily geared to the ultimate regulatory policies of minimizing losses to federal insurance funds and fostering public confidence in the savings and loan industry.¹⁴

¹⁴ Ironically, respondent chastises federal officials for promoting the merger between IASA and Investex, implying that these officials permitted a questionable merger to go forward in the hope of avoid-

Moreover, the discretionary choice between informal supervision and sterner regulatory measures is always subject to reevaluation, and regulators engaged in supervisory activities must consider whether particular corrective measures are likely to have sufficiently beneficial effects to justify continued forbearance from formal enforcement mechanisms.

There is, of course, an overlap of the skills brought to bear in making such decisions and the normal "professional and technical" skills employed by thrift managers themselves. But the same can be said of any regulatory decision—including the decisions of the individual inspectors in *Varig Airlines*, who necessarily drew on the same sort of "technical" skills employed by those in the aircraft industry. In particular, nearly any decision by federal regulators of financial institutions involves "professional" expertise. But this is not a reason to exclude all such decisions from the scope of the discretionary function exception. On the contrary, courts have recognized that such "subtle judgments * * * that draw upon a mix of law, accounting, bank custom, and policy" are precisely the kinds of decisions that Congress meant to protect from tort liability. *Golden Pacific Bancorp. v. Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988); see U.S. Br. 41-42 nn.29-30 and cases there cited. The agency decision-making in the present case involved this same "mix" of considerations. In advising IASA management regarding various ways of dealing with the institution's perceived difficulties, federal regulators certainly drew upon their knowledge

ing the \$40 to \$50 million loss to federal insurance funds that the failure of Investex by itself might cause. Resp. Br. 42-43 n.25. Whether or not respondent's criticisms of federal officials have any validity on the merits, they merely reinforce the proposition that federal officials were approaching these issues as matters of public policy. In any event, these particular decisions were among those that the court of appeals held to be within the discretionary function exception, Pet. App. 13a-14a, a ruling from which respondent did not seek review.

of "thrift management judgment." Nevertheless, the ultimate regulatory goals of such intervention required those officials also to consider the protection of federal insurance funds and the effects of an IASA failure on public confidence in the thrift industry. Thus, the actions taken here were indeed "grounded in social, economic, and political policy," and should not be "'second-guess[ed]' * * * through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814.

Respondent seems to contend that the actions at issue here necessarily fall outside the scope of the discretionary function exception because they affected IASA's "day-to-day" operations. Resp. Br. 35. Under federal statutes, however, the thrift industry is subject to extensive regulation,¹⁵ and the very purpose of regulatory initiatives is to influence just such operations. Certainly, the actions here become no less discretionary, and no less policy-oriented, simply because they were specifically tailored to a particular institution. As this Court's ruling in *Varig Airlines* makes clear, broadly applicable regulatory initiatives and specific applications of those initiatives are both encompassed within the discretionary function exception, as long as the particular action in question entails "policy judgment." 467 U.S. at 820. The actions at issue here necessarily involved such judgment, and

¹⁵ See U.S. Br. 2-4; see generally *Miami Beach Federal Savings & Loan Ass'n v. Callander*, 256 F.2d 410, 413-414 (5th Cir. 1958). As noted in our opening brief, Congress has recently made major changes to the statutory scheme of federal thrift regulation, but has not cut back on the pervasive nature of the regulatory scheme. See U.S. Br. 4-5 n.5 (discussing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183). Respondent errs in suggesting that FIRREA was adopted in response to the FHLBB's regulatory excesses. Resp. Br. 16-17, 45 n.27. FIRREA was intended to *strengthen* regulatory oversight of thrift institutions in view of the "crisis" created by the precipitous growth and poor management practices of many thrifts. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 298-301, 302-308 (1989).

therefore are protected by the discretionary function exception.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed, and the action should be dismissed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

OCTOBER 1990

* The Solicitor General is disqualified in this case.